IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK A. DENNEY	:	CIVIL ACTION
	:	
v.	:	
	:	
CSX TRANSPORTATION, INC.	:	NO. 01-4520

MEMORANDUM

Padova, J. **July 31, 2003**

Plaintiff, Frederick A. Denney, brought this action against CSX Transportation, Inc. ("CSX") under the Federal Employers' Liability Act ("FELA"), 45 U.S.C.A. §§ 51-60 (West 1986) (Count I) and common law (Count II) for personal injuries allegedly sustained within the scope of his employment at the Twin Oaks Railyard[1], near Aston, Delaware County, Pennsylvania. Before the Court is Defendant's Motion for Summary Judgment. For the reasons that follow, the Motion is granted.

I. BACKGROUND

Plaintiff was employed by Auto Rail Services of Pennsylvania, Inc., d/b/a/ Auto Resources Group-Pennsylvania ("ARG") to unload automobiles from railcars at the Twin Oaks Railyard. (DiGiacomo Aff. at 1.) He was injured on June 28, 2000, when he slipped on grease inside the middle deck of a tri-level railcar and fell onto the knuckle of the railcar. (Denney Dep. at 81-82, 107-108.) The accident occurred while Plaintiff was hanging deck plates on the

[1]The railyard where Plaintiff was employed is referred to by Defendant's witnesses as both the Twin Oaks Railyard and the Aston Railyard.

top deck of the railcar. (Id.) Plaintiff believes that the type of grease he slipped on is used to grease the channels on the track of the railcar door. (Id. at 100, 111-12.)

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the

adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993)). The Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. However, "mere allegations, bare assertions or suspicions are not sufficient to defeat a motion for summary judgment." Felton v. Southeastern Penn. Transp. Auth., 757 F. Supp. 623, 626 (E.D. Pa. 1991) (citation omitted).

III. DISCUSSION

A. FELA

In order to succeed in an action under FELA, Plaintiff must establish the following four elements: 1) defendant is a common carrier; 2) he was employed by defendant; 3) his injury occurred while he was employed by defendant; and 4) defendant's negligence

caused his injuries.[2] Felton v. Southeastern Penn. Transp. Auth., 952 F.2d 59, 62 (3d Cir. 1991). CSX argues that it is entitled to summary judgment on Plaintiff's claim pursuant to FELA because it was not Plaintiff's employer. Plaintiff admits that he was employed by ARG, but claims that he was also employed by CSX for purposes of FELA. (Compl. ¶ 10.)

The Supreme Court has determined that a plaintiff may prove that he was employed by a rail carrier for purposes of FELA while nominally employed by another employer in three ways:

> First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. See Restatement (Second) of Agency § 227; Limstead v. Chesapeake & Ohio R. Co., 276 U.S. 28 (1928). Second, he could be deemed to be acting for two masters simultaneously. See Restatement § 226; Williams v. Pennsylvania R. Co., 313 F.2d 203, 209 (2d Cir. 1963). Finally, he could be a subservant of a company that was in turn a servant of the railroad. See Restatement § 5(2); Schroeder v. Pennsylvania R. Co., 397 F.2d 452 (7th Cir. 1968).

Kelley v. Southern Pacific Co., 419 U.S. 318, 324 (1974). The United States Court of Appeals for the Third Circuit has determined

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[2]There is a relaxed standard of proof of negligence for FELA claims. Hines v. Consol. Rail Corp., 926 F.2d 262, 268 (3d Cir. 1991) (citation omitted) ("[a] trial court is justified in withdrawing issues from the jury's consideration only in those extremely rare instances where there is a zero probability either of employer negligence or that any such negligence contributed to the injury of an employee."). However, the other elements of a FELA claim, including employment, are not subject to relaxed standards of proof. See Fulk v. Illinois Cent. R. Co., 22 F.3d 120, 124 (7th Cir. 1994).

that the following factors should be used to determined whether a plaintiff is employed by a rail carrier as well as a nominal employer pursuant to Kelley:

> The primary factor to be considered in determining whether a plaintiff was employed by the defendant [under the Act] is whether the latter had the power to direct, control and supervise the plaintiff in the performance of his work at the time he was injured. Relevant factors to be considered are: who selected and engaged the plaintiff to do the work; who paid his wages for performing it; who had the power to terminate his employment; who furnished the tools with which the work was performed and the place of work.

Williamson v. Consol. Rail Corp., 926 F.2d 1344, 1350 (3d Cir. 1991) (citing Tarboro v. Reading Co., 396 F.2d 941, 943 (3d Cir. 1968)).

Plaintiff asserts that he was employed by CSX based upon his belief that his supervisor, Jim Azpell, is employed by CSX. (Denney Dep. at 57-58.)[3] However, Jim Azpell, Plaintiff's immediate supervisor, is an employee of ARG. (DiGiacomo Aff. at 1; Azpell Aff. at 1.) Mr. Azpell has provided an Affidavit in which he states the following: ARG employed Plaintiff to perform unloading of automobiles from rail cars at the Aston (Twin Oaks) Railyard. (Azpell Aff. at 1.) Mr. Azpell and other ARG personnel supervised the manner and performance of Plaintiff's job. (Id.)

[3]Plaintiff does not cite any facts in support of this belief, and he has not submitted any evidence which would support this belief. Moreover, he has admitted that he was never given any orders by anyone wearing a CSX uniform. (Denney Dep. at 67.)

Plaintiff reported to Azpell and other ARG managers/supervisors in the performance of his duties. (Id.) ARG conducted safety and training sessions to instruct Plaintiff in the performance of his job. (Id.) ARG provided Plaintiff with all tools necessary to complete the performance of his job. (Id. at 2.) ARG paid Plaintiff in connection with his employment. (Id.) Plaintiff receives worker's compensation benefits in connection with his injuries which are attributable to ARG. (Id.) Mr. Azpell also states in his Affidavit that CSX never directed Plaintiff's employment or the manner in which his duties were performed. (Id.)

CSX has also submitted the affidavit of Dennis Kilar, Assistant General Manager of Total Distribution Services, Inc. ("TDSI") which leases the Twin Oaks Railyard from CSX. (Kilar Aff. at 1, Def. Ex. B.) Mr. Kilar states that TDSI contracted with ARG to provide personnel and services, including the unloading of vehicles from railcars brought to the Twin Oaks Railyard. (Id.) CSX's only activity at that site is the transporting of automobiles in sealed railcars to the Railyard. (Id.) CSX locomotives transport sealed railcars to the yard and leave the railcars on side tracks for unloading. (Id.) ARG employees then unload the automobiles from the railcars. (Id.) Once the cars are unloaded, CSX locomotives return and remove the empty railcars. (Id.) Mr. Kilar also stated in his affidavit that CSX did not have any employees at this railyard who participate in, or supervise, the

unloading of vehicles from the railcars. (Id.) Those duties are performed by ARG employees, in accordance with its contract with TDSI. (Id.)

The uncontroverted evidence in the record before the Court shows that ARG directed, controlled and supervised the Plaintiff in the performance of his work at the time he was injured. See Williamson, 926 F.2d at 1350. ARG hired and paid Plaintiff to unload automobiles from railcars at the Twin Oaks Railyard, trained Plaintiff and supervised his work, and provided the tools he used for his work. CSX did not supervise Plantiff's work and did not have any employees involved in any way with the unloading of automobiles from railcars at the Twin Oaks Railyard. Plaintiff has adduced no evdience to support his contention that he was employed by CSX for purposes of his FELA claim. Therefore, the Court finds that Plaintiff has not established a genuine issue of material fact as to this issue and grants CSX's Motion for Summary Judgment on Count I.

B. Negligence

Count II of the Complaint alleges a claim against CSX for negligence under Pennsylvania common law. In order to succeed in an action for negligence under common law, a plaintiff "must demonstrate that the defendant owed a duty of care to the plaintiff, the defendant breached that duty, the breach resulted in injury to the plaintiff and the plaintiff suffered an actual loss

or damage." Brezenski v. World Truck Transfer, Inc., 755 A.2d 36, 40 (Pa. Super. Ct. 2000). Defendant argues that it is entitled to summary judgment on Plaintiff's negligence claim because it did not owe a duty of care to Plaintiff.

Plaintiff asserts, for purposes of Count II, that he was a business invitee of CSX and that CSX, as the owner of the railcar from which he fell, owed him a duty to make the railcar safe for his use or give him timely and adequate warning of the dangerous conditions within the railcar. (Pl.'s Mem. at 7.) Plaintiff relies on his bare assertion that the railcar from which he fell belongs to CSX. (Denney Dep. at 158.) He admits that he did not see a CSX designation anywhere on that railcar. (Id.)

CSX has submitted evidence that the railcar from which Plaintiff fell, number ETTX950183, is owned by Norfolk Southern Railroad, including photographs of railcar ETTX950183 which show the words "Norfolk Southern" prominently displayed on the side of the railcar, directly above the serial number. (Kilar Aff. at 2, Def.'s Ex. G.) CSX has also submitted uncontroverted evidence that the railcars it transports to the Twin Oaks Railyard are sealed before and during their transportation by CSX and that it does not load or unload those railcars. (Id. at 1-2.)

A railroad transporting loaded railcars from a connecting carrier to a consignee owes a duty to that consignee to make an inspection "sufficiently thorough to ascertain whether there is any

fairly obvious defect in its construction or state of repair which constitutes a likely source of danger." Ambrose v. Western Maryland Ry. Co., 81 A.2d 895, 898 (Pa. 1951) (italics in original). That duty requires the railcarrier to conduct "an inspection from the ground, the inspector walking around the car and looking at the running gear, brake rigging and visual inspection of the body of the car and its doors." Id. The railcarrier does not have a duty to break the seal on the railcar and inspect the inside of the railcar for dangerous conditions. See Dagostine v. Joseph Schlitz Brewing Co., 478 F. Supp. 38, 41 (E.D. Pa. 1979).

The uncontroverted evidence before the Court is that the dangerous condition which caused Plaintiff's injuries was inside the railcar, which was owned by the Norfolk Southern Railroad. CSX, as a carrier of loaded railcars to a consignee of the railcars, namely ARG, had no duty to unseal that railcar and inspect the inside for, and warn Plaintiff of, any dangerous condition existing inside of the railcar. Since the source of Plaintiff's injury lies outside of the duty of care owed by CSX to Plaintiff, CSX's Motion for Summary Judgment is granted as to Count II of the Complaint.

An appropriate order follows.

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O R D E R

AND NOW, this 19th day of June, 2002, in consideration of Defendant's Motion for Summary Judgment (Docket No. 26) and Plaintiff's response thereto, **IT IS HEREBY ORDERED** that the Motion is **GRANTED** pursuant to Federal Rule of Civil Procedure Rule 56 and **JUDGMENT** is entered in favor of Defendant and against Plaintiff.

BY THE COURT:

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John R. Padova, J.